FOR-GAU

Office-Supreme Court, U.
FILED
JAN 11 1951
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 492

MRS. C. H. FOUNTAIN, MISS MARY E. FOUNTAIN, MRS. T. E. BLOODWORTH, MRS. IRA HOLLIMAN, MRS. L. W. NEW AND J. DAVIS FOUNTAIN,

Petitioners,

vs.

GEORGIA POWER COMPANY,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

VICTOR DAVIDSON,
Irwinton, Ga.;
FRANK O. EVANS,
Milledgeville, Ga.;
J. B. JACKSON,
Gray, Ga.;
GEORGE JACKSON,
Gray, Ga.;
Counsel for Petitioners.

INDEX

	Page
Opinions Below	2
Summary of Matter Involved	2
Statement of Basis of Jurisdiction	6
Reasons Relied On for the Sanction of This Petition	7
The Assignments of Error and Portions of the Record Necessary for Clear Understanding	14
Conclusion	16
Appendix	17

Citations

Cases:

Adams v. *Camden Safe Dep. & Trust Co.*, 121 N.J. Law 389: A. 2d 361	11
Baker v. *Davis*, 127 Ga. 649 (4, 5), 57 S. E. 62	12
Brinkerhoff-Faris Trust & Savings Co. v. *Hill*, 281 U. S. 673, 680	9, 10
Brown et al. v. *Mississippi*, 297 U. S. 278	9, 10, 11
Buck v. *Kuykendall*, 267 U. S. 307, 316, 317	9
Chicago, Burlington & Quincy R. Co. v. *Chicago*, 166 U. S. 226	9, 13
Chicago & E. I. Ry. Co. v. *Miller*, 309 Ill. 257, 140 N. E. 823, 824	12
Davis v. *O'Hara*, 266 U. S. 314	9
Friedrichen v. *Renard*, 247 U. S. 207, 213	9
Georgia C. & N. Ry. Co. v. *Ridlehuber*, 38 S. C. 308, 17 S. E. 24	12
Hart Coal Corporation v. *Sparks*, D. C. Ky. 7 Fed. Supp. 16, 19	11
Herndon v. *Georgia*, 295 U. S. 441	10
Home Tel. & Tel. Co. v. Los Angeles et al., 227 U. S. 278, 57 L. E. 510	13
Montgomery v. *Suttles, T. C. et al.*, 191 Ga. 781, 13 S. E. 2d 781	11
Shelley et al. v. *Kraemer*, 334 U. S. 314	9
Southern Motorways v. *Perry*, 39 F. 2d 145	11
Twining v. *New Jersey*, 211 U. S. 78, 90, 91	9

190211

Statutes:

	Page
Fourteenth Amendment to the Constitution of the United States	4, 5, 7, 8
U.S.C.A. Title 28, Sec. 1257 (3), Sec. 2101 (c)	6

Miscellaneous:

16 C.J.S., 186, Const. Law Sec. 89	12

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 492

MRS. C. H. FOUNTAIN, MISS MARY E. FOUNTAIN, MRS. T. E. BLOODWORTH, MRS. IRA HOLLIMAN, MRS. L. W. NEW AND J. DAVIS FOUNTAIN,

Petitioners,

vs.

GEORGIA POWER COMPANY,

Respondent

PETITION FOR WRIT OF CERTIORARI DIRECTED TO THE SUPREME COURT OF GEORGIA TO REVIEW A DECISION OF SAID COURT.

To the Honorable Chief Justice of the United States, and the Honorable Associate Justices of the Supreme Court of the United States:

Mrs. C. H. Fountain, Miss Mary E. Fountain, Mrs. T. E. Bloodworth, Mrs. Ira Holliman, Mrs. L. W. New, and J. Davis Fountain, all citizens of the United States and of the State of Georgia, bring this petition for the writ of certiorari to be directed to the Supreme Court of the State of Georgia for the purpose of obtaining in this Honorable

Court a review and, if conformable to law, a reversal of a decision of the Supreme Court of the State of Georgia, entered finally on the 13th day of October, 1950, (R. 168, 183) in the case of Georgia Power Company, Plaintiff in Error, *vs.* Mrs. C. H. Fountain, Miss Mary E. Fountain, Mrs. T. E. Bloodworth, Mrs. Ira Holliman, Mrs. L. W. New, and J. Davis Fountain, Defendants in Error, docketed in said court as case Number 17,177.

The Supreme Court of Georgia has appellate jurisdiction in such cases and is the highest court of the State of Georgia in which a decision in this case could be had.

Part I

Opinions Below

The Opinion of the Supreme Court of Georgia, Justices Candler, Wyatt and Atkinson, the concurring opinion of Justice Almand; the dissenting opinion of Justice Hawkins, concurred in by Chief Justice Duckworth and Justice Head (R. 156-167) are reported in 207 Ga. 361 as reported in Advance Sheets Georgia Law Reporter Dec. 8, 1950, and the Advance Sheets of the Southeastern Reporter dated November 16, 1950, 61 S. E. 2d 454.

Part II

Summary of Matter Involved

1

(i) On October 28, 1948, Georgia Power Company by petition began a condemnation proceedings in Wilkinson County, Georgia, condemning certain property of petitioners, notifying petitioners to appoint an assessor and fixing November 18, 1948, as the date for a hearing as to the value before the assessors and had petitioners served (R. 13).

(ii) On November 13, 1948, petitioners filed in the Superior Court of Wilkinson County, Georgia, their petition for an injunction against the condemnation proceedings of Georgia Power Company, and a restraining order was granted (R. 21).

On the hearing of the petition before the Judge, the restraining order was dissolved and an interlocutory injunction denied on December 17, 1948 (R. 25).

(iii) On January 7, 1949, the assessors held a hearing on the question of value of the property condemned. Petitioners offered evidence of value to rebut evidence introduced by the condemnor, and refused the award found by the assessors when tendered by condemnor, and appealed the case to the Superior Court. The Georgia Power Company paid the award into court and seized the property (R. 31-32).

(iv) On January 2, 1950, when the injunction case was called for trial Georgia Power Company presented a motion to dismiss the petition of petitioners on the grounds that petitioners had estopped themselves from prosecuting the injunction petition by taking part in the hearing before the assessors and after refusing the award had appealed the case to the Superior Court (R. 32). The motion was denied and Georgia Power Company filed its exceptions pendente lite on January 7, 1950 (R. 37).

(v) After a verdict and judgment in favor of petitioners on January 4, 1950, and denial of and motion for new trial, Georgia Power Company was granted a bill of exceptions to the Supreme Court of Georgia May 1, 1950 (R. 37).

(vi) On September 11, 1950, the Supreme Court of Georgia entered its decision holding that when petitioners introduced evidence of value before the assessors but refused to accept the award, they estopped themselves and the court

below should have dismissed the petition for injunction, and reversed the lower court (R. 168).

(vii) On September 20, 1950, petitioners filed their motion for rehearing in the Supreme Court of Georgia (R. 168), and presented the federal questions upon which this petition for certiorari is based (R. 176-177).

(viii) On October 13, 1950, the Supreme Court of Georgia, denied the motion for rehearing (R. 183) and Justice Hawkins entered a dissenting opinion concurred in by Chief Justice Duckworth and Justice Head.

2

Petitioners here contend that the Supreme Court of Georgia in its decision reversing the Superior Court of Wilkinson County, ignored the federal rules applicable in the case, and ignored the federal questions presented in the motion for rehearing, and applied rules of procedure and an unwarranted construction of a statute of procedure applicable in cases arising under statutory laws of the State. The basic questions were left untouched, but the practical effect of the decision was to decide the questions in a way probably not in accord with applicable decisions of this Court.

3

The effect of the decision is to deny petitioners their rights as to due process and the equal protection of the laws under the portion of the Fourteenth Amendment to the Constitution of the United States, which reads, in part:

> ". . . nor shall any state deprive any person of life, liberty, property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws".

and thus enable the Georgia Power Company to take said property, regardless of there being any public necessity,

and thus to deprive petitioners of their property without due process of law, and to deny to petitioners the right to prosecute their cause in the courts of the State, and to deny them the equal protection of the laws, and to leave petitioners without any remedy for the wrongful taking of their property by Georgia Power Company.

4

Petitioners contend that Georgia Power Company by virtue of the power of eminent domain granted to it by the State of Georgia has abused the grant of portion of the sovereignty of the State, and by its conduct, and by virtue of the decision of the Supreme Court of Georgia herein complained of has deprived petitioners of their property without due process of law, and in violation of their rights under the Fourteenth Amendment as above quoted:

For that

(i) The said company after the Superior Court of Wilkinson County had denied the interlocutory injunction to petitioners, and while the injunction proceedings were still pending in the Superior Court awaiting trial by jury, prosecuted its condemnation proceedings, and sought to take petitioners' property at a nominal valuation fixed by the evidence the company introduced. Your petitioners, having been denied an interlocutory injunction, unwillingly appeared before the assessors and offered evidence of value to rebut that of the condemnor and refused to accept the award and appealed the matter to the Superior Court, that being the only manner the condemnation proceedings could be held in statu quo until the injunction petition could be heard before a jury, and being the only method petitioners had of protecting the value of the property in the event the final decision of the courts should be adverse to them

in the injunction proceedings. Immediately after the award of the assessors, the Georgia Power Company tendered the amount of the award to petitioners and upon their refusing to accept it, paid it into court and immediately took possession of the property, although it had notice of petitioners' intention to prosecute the injunction proceedings.

(ii) The said company, at a time when petitioners had no remedy either at law or in equity to prevent the taking of said property, and had no choice in the protection of the value of the property, but to act as it did, used the laws of Georgia providing for the condemnation of property, to aid it in taking petitioners' property.

(iii) The said company on the day the petition for injunction was called for trial, presented its motion to dismiss the petition for injunction on the grounds that petitioners were estopped from prosecuting it because they had participated in the hearing before the assessors had appealed the matter to the Superior Court, and after the court had denied the motion, and after a jury had rendered a verdict and the court had entered judgment hereon in favor of petitioners filed its exceptions pendente lite to the denial of the motion to dismiss. The motion was denied and the Supreme Court of Georgia on bill of exceptions held that petitioners had estopped themselves as alleged by the company, and reversed the decision of the lower court.

Part III

Statement of Basis of Jurisdiction

Petitioners state that this Court has jurisdiction to review the decision complained of by reason of authority granted in U. S. C.A. Title 28, Sec. 1257 (3), Sec. 2101 (c) and Rule 38 Subparagraph (a) of paragraph 5 of the Supreme Court.

Petitioners contend that the Supreme Court of the United States has jurisdiction to entertain and sanction this petition for certiorari, and to grant the relief sought by petitioners because substantial federal questions are present and presented in the case as follows:

(a) Whether the action of Georgia Power Company after petitioners were denied an interlocutory injunction and the methods employed by it in condemning the property before the Board of Assessors, the taking of the property of petitioners without allowing them to be heard on the question of whether there was any public necessity for the taking of same, as set forth specifically in sub-paragraphs (i), (ii), (iii) and (iv) of Paragraph 1 of Part II of this petition for certiorari deprived petitioners of their property without due process of law and violated petitioners' rights under the Fourteenth Amendment of the Constitution of the United States.

(b) Whether the decision of the Supreme Court of Georgia in failing to rule specifically on the federal questions set forth in the motion for rehearing, deciding the case on rules of procedure and reversing the lower court on the grounds of estoppel and election of remedies as set forth in sub-paragraph (vi) (vii) and (viii) of Paragraph I of Part II of this petition for certiorari also denied and deprive l petitioners of their property and their rights as set for h above without due process of law and denied them equal protection of the law, as guaranteed them under the Fourteenth Amendment to the Constitution of the United States.

Part IV

Reasons Relied On for the Sanction of This Petition

Petitioners most respectfully contend that this Honorable Court ought to permit the filing of this petition and

sanction the same and review the opinion and judgment complained of for these reasons:

(a) Because the judgment of the Supreme Court of Georgia constitutes a gross miscarriage of justice, and the Supreme Court of the United States is the only Court in which they can seek its correction.

(b) Because the Supreme Court of Georgia split three ways on the decision, three dissenting Justices, including the Chief Justice, three Justices and one concurring Justice for the reversal of the lower court, the concurring Justice placing his decision on a ground different from the other three.

(c) Because Justice Almand in his concurring opinion places his decision on the grounds of *laches* on the part of petitioners. No allegation or evidence of *laches* on the part of petitioners was shown by the record, and, hence the ground of his decision was utterly erroneous. Yet, without his concurring opinion, there would have not been sufficient justices to have overruled the lower court.

(d) Because the majority decision of the Supreme Court of Georgia ignored the federal questions in the motion for rehearing and dealt merely with State Court rules and a State statute involving procedure in State courts and thereby decided the question, in effect, in a way not in accord with applicable decisions of this court. And the Supreme Court of the United States should review decisions of the court of last resort of a State, where as in this case, the court ignored the federal questions raised and the decision complained of has the effect of depriving a litigant of his property without due process of the law and denies to the litigant the equal protection of the laws guaranteed by the Fourteenth Amendment as set forth in the Motion for Rehearing. In such, the action of the

majority of the court is the action of the State as contemplated by the Fourteenth Amendment.

Brinkerhoff-Faris Trust & Savings Co. v. *Hill* 281 U. S. 673, 680

Shelley Et. Al. v. *Kraemer,* 334 U. S. 314.

Twining v. *New Jersey* 211 U. S. 78, 90, 91.

Chicago, Burlington & Quincy R. Co. v. *Chicago* 166 U. S. 226. (See appendix atached page 17.)

It was held in *Brown et. al.* v. *Mississippi,* 297 U. S. 278 that a State Court may not ignore federal questions raised, and decide the case on a mere rule or statute of procedure, when the application of such rule or statute denies constitutional rights, and "offends some principle of justice so rooted in the traditions and conscience of the people as to be ranked as fundamental", as it does in this case.

Again in *Davis* v. *O'Hara,* 266 U. S. 314 the Court held that in such cases the Supreme Court of the United States will "determine whether the failure to follow the procedure designed by a State for their protection constitutes a waiver of them."

The decision in the case at bar in holding that petitioners made an election of remedies when they involuntarily appeared before the assessors in an effort to prevent the condemnor from taking the property at its own valuation is not in accord with

Friedrichen v. *Renard,* 247 U. S. 207, 213. (See appendix attached, page 17.)

in which case the act of the person held estopped was involuntary, and analogous to the case at bar.

And the application of the doctrine of estoppel in the decision, in view of the fact that petitioners refused to accept the award and received no benefit is not in accord with the decision in the case of *Buck* v. *Kuykendall,* 267

U. S. 307, in which it was held that a person who has received no benefit from and does not rely on a statute is not estopped from attacking its validity.

(e) Because substantial federal questions were timely presented.

Petitioners presented their substantial Federal Questions at the earliest possible time after the surprise decision which held that petitioners had estopped themselves from further prosecuting the injunction proceedings, in their Motion for Rehearing as set out in Sub-paragraph (vii) of Part II of this petition, and said presentation was timely, inasmuch as it was the first opportunity they had to raise the questions after the said court had rendered the unexpected decision which petitioners contend is not in accord with other decisions of said court, or of any other State or Federal Court which petitioners or their counsel have ever been able to find, and said ruling was a surprise to them.

Herndon v. *Georgia,* 295 U. S. 441. (See appendix attached, page 18.)

Brinkerhoff-Faris v. *Hill,* 281 U. S. 673, 677-8. (See appendix attached, page 18.)

Petitioners could not have anticipated the surprise decision of the State court because all previous decisions by this court on the question of estoppel by taking part in the proceedings before assessors, it had emphasized the estoppel as having come about by the accepting of the award of the assessors. Likewise, petitioners and their counsel had been able to find no decision having ever been made in any State having eminent domain laws similar to Georgia where it had been held that a condemnee had ever been estopped in an injunction proceedings when he had refused to accept the award. Petitioners had every reason to believe that the Supreme Court of Georgia would

follow the principle stated in the case of *Montgomery* v. *Suttles, Tax Collector,* et. al., 191 Ga. 781, 13 S.E. 2d 781, which held that a taxpayer objecting to an assessment and taking part in the arbitration on same was not estopped from subsequently attacking the award in equity. Numerous States have similar requirements to those of Georgia, in that where a property owner contests the right of condemnor to condemn, he must attack in the court of equity, while the condemnation proceedings must proceed in a court of law. Petitioners and their counsel had reason to believe and did believe the Supreme Court of Georgia, in ruling on the question of estoppel and the election of remedies in connection with the involuntary appearance of petitioners before the assessors would render a decision in line with the decisions of the Supreme Court of the United States on similar or analogous principles such as

Friedrichsen v. *Renard,* supra.

Buck v. *Kuykendall,* 267 U. S. 307, 316 (See appendix, page 18)

or decisions on similar principles in the Federal District Courts such as

Southern Motorways v. *Perry,* D. C. Ga., 39 F. 2d 145,

where there was an effort to comply with a statute but repudiated it and the statute was used to his present disadvantage.

Hart Coal Corporation v. *Sparks,* D. C., Ky., 7 Fed. Supp. 16, 19,

which held involuntary submission did not operate as an estoppel.

Or in line with the decisions of the courts of other States having similar laws on estoppel and eminent domain, such as:

Adams v. *Camden Safe Dep. & Trust Co.,* 121 N. J. Law 389, A 2d 361;

Chicago & E. I. Ry. Co. v. *Miller*, 309 Ill. 257, 140 N. E. 823, 824;

Georgia C. & N. Ry. Co. v. *Ridlehuber*, 38 S. C. 308, 17 S. E. 24, 16 C. J. S., page 186, Const. Law Sec. 89. (See appendix, page 19)

all of which decisions are contrary to the decision complained of.

Or in line with its own decisions such as

Montgomery v. *Suttles, T. C., supra;*

Baker v. *Davis*, 127 Ga. 649 (4, 5) 57 S. E. 62,

which are likewise in conflict with the within decision.

And petitioners could not anticipate the court would extend the doctrine of estoppel in the cases cited in its opinion to such an extent as would deny petitioners' constitutional rights, or make such a strained construction of Code Section 3-601 of the Georgia Code of 1933, when your petitioners having no other remedy involuntarily introduced evidence before the assessors and then refused the award, reaping no benefit, practicing no fraud on condemnor, nor misleading condemnor nor causing him to change his position for the worse.

Neither could petitioners anticipate that Justice Almand, in his concurring opinion would base his decision on the ground of laches when the condemnor, in the motion to dismiss made no allegation of laches, and, without the concurring opinion of Justice Almand the court would have been equally divided and the decision of the Superior Court would have been affirmed under the rules of the Supreme Court of Georgia.

(f) Because the methods used by Georgia Power Company in the exercise of that portion of the sovereignty of Georgia, the power of eminent domain, with which it is endowed by the State of Georgia, and as outlined in sub-

paragraphs (i), (ii), (iii) and (iv) of Part II of this petition for certiorari are utterly shocking to the conscience of justice, and deprive petitioners of their property without due process of law.

Home Tel & Tel. Co. v. *Los Angeles, et al.*, 227 U. S. 278, 57 L. E. 510 (See appendix attached, page 19).

(g) Because the decision of the Supreme Court of Georgia, after a verdict and judgment had found that there was no public necessity in taking said property, rendered its decision in favor of the Georgia Power Company authorizing its taking of the property of petitioners, and putting its judicial ratification upon this "act of spoliation" as outlined in sub-paragraph (vi) of Part II of the petition for certiorari conflicts with and is utterly irreconcilable to the protection of the right to property and to the equal protection of the laws, guaranteed by the Fourteenth Amendment to the Constitution of the United States. And is decidedly not in accord with the case of

Chicago, Burlington & Quincy R. R. Co. v. *Chicago*, 166 U. S. 226 (See appendix atached, page 17).

(h) Because this petition for certiorari sets forth questions of deep public concern in the several states in that it involves questions affecting the administration of jurisprudence relative to the taking of private property under the procedure of eminent domain where there is no public necessity, and the manner by which property owners can protect themselves by injunction from unlawful condemnation in one court and at the same time protect themselves from having their property taken at an infinitesimal valuation in another tribunal without estopping themselves from continuing their injunction.

(i) Because the decision is of such deep public concern and capable of so much mischief that by reason of the unusual and divided opinion of the Supreme Court of

Georgia on a question not heretofore decided by any court, unless it is determined by the United States Supreme Court, there is likely to arise much litigation throughout the several states having similar laws of eminent domain, and this decision will be cited as an authority. The Superior Courts and the Court of Appeals of Georgia being bound by the Supreme Court decision much injustice is likely to occur.

PART V

The Assignments of Error and Portions of the Record Necessary for Clear Understanding

Error is assigned on the making and entering of the judgment of the Supreme Court of Georgia, dated the 13 day of October, 1950, based upon an opinion of said court dated October 13, 1950, and assigns error on said opinion (R. 156) and the concurring opinion of Justice Almand (R. 163).

Only the following portions of the record are specified as necessary for a clear understanding of the errors complained of:

(1) The petition for injunction and the rule *nisi* thereon filed November 13, 1948, together with the two copies of the condemnation proceedings of Georgia Power Company attached as "Exhibit A" and "Exhibit B" (R. 11).

(2) The answer of Georgia Power Company filed December 8, 1948 (R. 21).

(3) The amendment to petition for injunction filed December 11, 1948, (R. 33).

(4) Interlocutory judgment of the court dated December 17, 1948 (R. 25).

(5) Oath of Assessors (two separate oaths) dated January 7, 1949 and filed January 13, 1949 (R. 26).

(6) Awards of assessors (two separate awards) dated January 7, 1949 and filed January 13, 1949 (R. 27, 28).

(7) Appeals of condemnees to both awards, dated January 17, 1949 and filed January 17, 1949, (R. 29, 30).

(8) Appeals of condemnor to both awards dated January 14, 1949 and filed January 13, 1949, (R. 30).

(9) Motion of Georgia Power Company to dismiss petition filed January 2, 1950, and order of court overruling and denying said motion, (R. 31).

(10) Amendment to answer of Georgia Power Company and order of court thereon, filed January 4, 1950 (R. 34).

(11) Amendment to petition, filed January 4, 1950, (R. 33).

(12) Verdict of Jury, dated and filed January 4, 1950, (R. 36).

(13) Judgment of court on the verdict dated and filed January 4, 1950 (R. 37).

(14) Bill of exceptions pendente lite of Georgia Power Company and order and certificate of court thereon, filed January 7, 1950, (R. 37).

(15) Motion in arrest of Judgment by Georgia Power Company and order thereon, filed January 7, 1950, (R. 42).

(16) Amendment to motion in arrest of Judgment and order of court thereon, filed March 25, 1950, (R. 49).

(17) Order overruling motion in arrest of judgment, as amended, dated and filed April 22, 1950, (R. 155).

(18) Bill of exceptions of Georgia Power Company to Supreme Court filed May 1, 1950, in the Superior Court, together with the order of the court certifying the same as true and ordering the Clerk to transmit the case to the Supreme Court of Georgia, and the filing entry and docketing of the case in that court, (R. 1).

(19) The opinion of the Supreme Court entered on September 11, 1950 (R. 156).

(20) The motion for rehearing filed by petitioners on the 20th day of September, 1950, and the certificate or acknowledgement of service thereon (R. 168).

(21) The order of the court denying a rehearing in the case entered on October 13, 1950, (R. 183).

(22) The concurring opinion of Justice Almand, entered on the 13 day of October, 1950, (R. 163).

(23) The Dissenting opinion of Justice Hawkins, concurred in by Chief Justice Duckworth and Justice Head entered October 13, 1950, (R. 166).

(24) The motion to stay the remittitur addressed to the Chief Justice of the Supreme Court of Georgia, and the order thereon, dated October 23, 1950, (R. 184).

Petitioner avers that the portions of the record catalogued above and included in the entire record transmitted constitute the entire record necessary to a clear understanding of the errors here complained of.

Part VI

Wherefore, Your petitioners pray that an order be now entered granting and sanctioning this petition for certiorari; that the portions listed above of the certified transcript of proceedings of said court in the cause entitled upon its docket as Georgia Power Company, Plaintiff in Error *vs.* Mrs. C. H. Fountain, et al., Defendants in Error, numbered 17177, transmitted herewith, be treated as though sent up in response to a formal writ: that said cause may be reviewed and determined by this court and that petitioner have such other and further relief in the premises as this Honorable Court may deem appropriate.

Victor Davidson,
Irwinton, Ga.
Frank O. Evans,
Milledgeville, Ga.
J. B. Jackson, George Jackson,
Jackson & Jackson, Gray, Ga.
Counsel for Petitioners.

APPENDIX

DECISIONS CITED UNDER SUB-PARAGRAPHS UNDER PART IV

(d)

Friederichsen *v.* Renard, 247 U. S. 207, 213, 62 L. E. 1075, 1084.

"At best this doctrine of election of remedies is a harsh, and now largely obsolete, rule, the scope of which should not be extended, as it must be in order to reach the case at bar, for here the 'amended petition' was not filed by petitioner's counsel of their own motion, but on order of the court, entered in its discretion, to promote the ends of justice.

"Thus, we are brought to the conclusion that since the two remedies asserted by the petitioner were alternative remedies and since the order made, requiring the conversion of the suit in equity into one at law, was entered by the court sitting in chancery, for us to affirm the judgment of the circuit court of appeals that the petitioner, in obeying the order of the trial court, made a fatal choice of an inconsistent remedy, would be to subordinate substance to form of procedure", . . .

From Chicago, Burlington & Quincy Railroad Co. *v.* Chicago, 166 U. S. 226, 235, 41 L. E. 979, 984, we quote:

"In Davidson *v.* New Orleans, above cited, it was said that a statute declaring in terms, without more, that the full and exclusive title to a described piece of land belonging to one person should be and is hereby vested in another person, would, if effectual, deprive the former of his property without due process of law, within the meaning of the 14th Amendment. See also Missouri P. R. Co. *v.* Nebraska, Board of Transportation, 164 U. S. 403, 417 (ante, 489, 495). Such an enactment would not receive judicial sanction in any country having a written Constitution distributing the powers of government among three co-ordinate departments, and committing to the judiciary, expressly or by implication, authority to enforce the provisions of such

Constitution. It would be treated, not as an exertion of legislative power, but as a sentence—an act of spoliation."

(e)

Herndon *v.* Georgia, 295 U. S. 441, 79 L. E. 1530.

Headnote 4.

"The rule that the Federal question necessary to a review of a state court's decision by the Supreme Court of the United States cannot be first raised after judgment by a petition for rehearing is subject to an exception where the question first arose from the unanticipated act of the state court in giving to a statute a new construction which threatened rights under the Constitution, so that the petition for rehearing presented the first opportunity for raising it."

Brinkerhoff-Faris Trust & Savings Co. *v.* Hill, 281 U. S. 673, 74 L. E. 1107.

Headnote 1.

"A Federal question raised for the first time on petition for rehearing in the highest court of the state is raised in time, where it is presented by a construction placed upon a statute by such court in its decision, at variance with a construction formerly adopted by it."

Headnote 8.

"Whether acting through its judiciary or through its legislature, a state may not deprive a person of all existing remedies for the enforcement of a right which the state has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it."

Buck *v.* Kuykendall, 267 U. S. 307, 316, 317, 69 L. E. 623, 627.

"By motion to dismiss, filed in this court, the state makes the further contention that Buck is estopped from seeking relief against the provisions of §4. The argument is this: Buck's claim is not that the department's action is unconstitutional because arbitrary or unreasonable because use

of the highways for interstate commerce is denied unless the prescribed certificate shall have been secured. Buck applied for a certificate. Thus he invoked the exercise of the power which he now assails. One who invokes the provisions of a law may not thereafter question its constitutionality. The argument is unsound. It is true that one cannot, in the same proceeding, both assail a statute and rely upon it." . . .

16 C. J. S. p. 186.

"The doctrine of estoppel in pais has been held inapplicable to one who has not been guilty of fraud, or whose conduct has not misled another as to the validity of a statute, simply because he has treated as legal and valid an act void and open to the inspection of all. Thus, it has been held, in some instances, that one will not be estopped, by his acts or omissions, to question the constitutionality of a statute, if his adversary is not thereby prejudiced, where such injury came about as the result of his own instigation; and it has been held that a party may question the constitutionality of a statute where his conduct with reference to the subject of the act has not been such that to permit him to do so would place his adversary in a less favorable position than he would have occupied if the act had not been passed."

(f)

Home Telephone & Telegraph Co. *v.* Los Angeles, 227 U. S. 278, 57 L. E. 510.

Headnote 3.

"A case where one in possession of state power uses that power to the doing of wrongs which are forbidden by U. S. Const., 14th Amend., is within the purview of that Amendment, even though the consummation of the wrong may not be within the powers possessed, if the commission of the wrong itself is rendered possible or is efficiently aided by the state authority lodged in the wrongdoer."

FILED
FEB 15 1951
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 492

MRS. C. H. FOUNTAIN, MISS MARY E. FOUNTAIN et al.,
Petitioners,

vs.

GEORGIA POWER COMPANY,
Respondent

BRIEF
OF COUNSEL FOR THE RESPONDENT IN OPPOSITION TO THE GRANT OF THE WRIT OF CERTIORARI

MacDougald, Troutman,
Sams and Schroder
Atlanta, Georgia

A. S. Boone, Jr.
Irwinton, Ga.
of Counsel.

Wallace Miller
Wallace Miller, Jr.
Miller, Miller and Miller
515 *Person Building*
Macon, Georgia
Attorneys for Respondent

SUBJECT MATTER INDEX

I

Statement of the Case 1-7

II

Petitioners' Basis of Claim for Jurisdiction
(Fourteenth Amendment U. S. Constitution) 7

III

Brief and Argument 7-20

A

Fourteenth Amendment No Grounds for Asserted
Jurisdiction 7-10

B

Alleged Federal Question Raised on Motion for
Rehearing in State Court of Last Resort Too Late 10-16

C

Decision of State Supreme Court was Based on
Purely State Question which is of no Federal Concern.....16-18

Conclusion 18-20

CASES CITED

Atlantic & Birmingham Ry Co. vs. Penny, 119 Ga. 479 16

Beard vs. Beard, 197 Ga. 487 15

Board of Education vs. Day, 128 Ga. 156 14

Board of Education of Houston County et al. vs
Board of Trustees of Ft. Valley Consolidated
School District, 170 Ga. 509 (2) 12

Boom Co. vs. Patterson, 98 U. S. 403-406, 25 L. Ed. 206-207 10

Brockhaus vs. Rose, 221 Pac. 28 15

Central of Georgia Ry Co. vs. Bibb Brick Co., 149 Ga. 38 16

Central Vermont Ry Co. vs. White, Admrx., 238
U. S. 507, 513 18

Chapple vs. High, 161 Ga. 629 15

Davis vs. Wakelee, 156 U. S. 680 15

Ellis vs. Ellis, 161 Ga. 360 15

Erie RR. Co. vs. Tompkins, 304 U. S. 64, 82 L. Ed 1188 18

Equitable Life Assurance Society vs. May, 82 Ga. 646 15

Georgia Granite RR. Co. vs. Venable, 129 Ga. 341 16

Georgia Power Co. vs. Decatur, 173 Ga. 219 (3) 17

Hand vs. Brown, 144 Ga. 272 15

Hawthorne vs. Pope, 51 Ga. App. 498 15

Herndon vs. Georgia, 295 U. S. 441, 79 L. Ed. 1530 13

Houston vs. Thomas, 168 Ga. 67 13

Intertype Corp. vs. Pulver, 135 Sou. 793 15

Jackson vs. Johnson, 164 Ga. 839 13

Joslin Mfg. Co. vs. Providence, 262 U. S. 667, 67 L. Ed. 1167 9

Kern vs. Rogers, 118 N. W. 515 16

Loftin vs. Southern Sec. Co., 162 Ga. 730 13

Market Street Ry. Co. vs. Railroad Commission of California, 324 U. S. 548, 89 L. Ed. 1171 17

McClellan vs. McClellan, 135 Ga. 95 15

McGill vs. Osborne, 131 Ga. 541 (2) 17

Moran vs. Horsky, 178 U. S. 205 18

Neal Banking Co. vs. Chastain, 121 Ga. 500 16

Oliver vs. Union Point & White Plains Ry. Co. 83 Ga. 257 17

Pilgreen vs. City of Atlanta, 204 Ga. 710 17

Preston vs. City of Chicago, 226 U. S. 447 18

Preston vs. Newton, 213 Mass. 483, 100 N. E. 641 16

Rindge vs. Los Angeles County, 262 U. S. 700, 709, 67 L. Ed. 1186, 1193 10

Rogers vs. Toccoa Electric Power Co., 163 Ga. 919 (5) 13

Savannah, Florida & Western Ry. Co. vs. Postal Telegraph-Cable Co., 115 Ga. 554 (2) 11

Seeley vs. Mitchell, 85 Ky. 408, 4 S. W. 190 16

Shoemaker vs. U. S., 147 U. S. 282, 37 L. Ed. 170 10

Smith vs. Ga. Granite Corp., 186 Ga. 634, 639 17

Tift vs. Atlantic Coast Line RR. Co. et al., 161 Ga. 432 (4), 446 11

Trickey vs. Schlader, 52 Ill. 78 16

U. S. vs. Carmack, 329 U. S. 230, 247, 91 L. Ed. 209, 220 10

Vaughn vs. Strickland, 108 Ga. 660 16

H. G. Vogel Co. vs. Original Cabinet Corp., 233 N. W. 200 15

Warner vs. Hill, 153 Ga. 510 15

Wells vs. Goss, 110 La. 347, 34 Sou. 470 16

Winslow vs. B. & O. RR. Co., 208 U. S. 59, 52 L. Ed. 388 16

TEXTBOOKS CITED

18 Am. Jur., Sect. 12, p. 135 15

18 Am. Jur., Sect. 53, p. 168 15

18 Am. Jur., Sect. 106, p. 733 10

1 C. J., Sect. 443, p. 1169 16

20 C. J., Sect. 19, p. 28 15

20 C. J., Sect. 20, p. 29 15

20 C. J., Sect. 21, p. 32 15

20 C. J., Sect. 33, p. 38 15

30 C. J., Sect. 311, p. 884 16

28 C. J. S., Sect. 16, p. 1091 16

Lewis Eminent Domain, 3rd Ed., Vol. 2, Sect. 929,p. 633 16

Lewis Eminent Domain, 3rd Ed., Vol. 2, Sect. 611, p. 1075 16

10 R. C. L., Sect. 179, p. 210 16

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 492

MRS. C. H. FOUNTAIN, MISS MARY E. FOUNTAIN et al.,
Petitioners,

vs.

GEORGIA POWER COMPANY,
Respondent

BRIEF
OF COUNSEL FOR THE RESPONDENT IN OPPOSITION TO THE GRANT OF THE WRIT OF CERTIORARI

I
STATEMENT OF THE CASE

A succinct statement of the case, in our opinion, is necessary for a clear understanding of it and for a proper response to the application for writ of certiorari.

On October 28, 1948, Georgia Power Company, respondent herein,being unable by contract to acquire rights-of-way for electrical transmission purposes across the lands of petitioners herein in Wilkinson County, Georgia, served upon such petitioners as the owners of the lands involved, as provided by Chapter 36-3 of the

1933 Code of Georgia Annotated, its notices and petitions to condemn such rights-of-way for such purposes. (T. R. 13-20)

Pursuant to said statute of the State of Georgia, such notices and petitions to condemn set a date for a hearing on the same before assessors, one named by the company, one to be named by the landowners, and a third to be selected by the two so named. The date set for hearing was November 18, 1948. (T. R. 13-20)

On November 13, 1948, the landowners filed in the Superior Court of Wilkinson County, Georgia, against Georgia Power Company, their petiton in equity, seeking an injunction against Georgia Power Company, and seeking to enjoin the company from further prosecution of the condemnation proceedings. (T. R. 11-21)

As provided by the statutes and proceedure in Georgia, the trial court issued a rule nisi, directed to the company, requiring the company to show cause why an interlocutory writ of injunction should not be granted as prayed for, and setting December 3, 1948, as the date for the hearing thereon. (T. R. 21)

On said last-mentioned date, December 3, 1948, the interlocutory hearing was held, evidence was presented to the judge of the court by both sides, and argument was had before the court by counsel for both sides, and the court took the matter under advisement, and on December 17, 1948, rendered its judgement, denying the writ of injunction sought by the landowners. No appeal was taken from this judgment and no exceptions were preserved. (T. R. 25)

Thereafter the statutory condemnation proceedings proceeded according to law; the landowners named their assessor, and their assessor with the assessor for the company agreed upon a third assessor; and a hearing was held thereon; all as provided by law, on January 7, 1949. At said hearing, which was held solely for the purpose of ascertainng the value of the rights-of-way and damage to the landowners therefor, both Georgia Power Company and the landowners, petitioners herein, were represented in person and by counsel, and both submitted evidence of such value and damage to the assessors, and argued their respective causes to the assessors.

(Approved recitals Bill of Exceptions T. R. 39 and T. R. 158-159)

Pursuant to the law of Georgia, Georgia Power Company tendered the amount of the awards to the landowners, which was required before it could go into possession of the rights-of-way for the purposes condemned, and such tender was refused by the landowners; whereupon, the company, pursuant to said statutes, deposited said sums with the Clerk of the Superior Court of Wilkinson County, Georgia, subject to be withdrawn by the landowners at any time. (T. R. 38 & 39)

The sums of the awards are still intact with the clerk of the court and have not been withdrawn by landowners to this date. (T. R. 39)

Thereafter, and within ten days of January 7, 1949, all as provided by law, both Georgia Power Company and the landowners appealed the awards of the assessors to the Superior Court of Wilkinson County, Georgia, for a trial before a jury therein, on the question of such value and damages; both parties in their appeals alleging their dissatisfaction with the awards of the assessors, all as provided by law. Both of these appeals prosecuted by both the Company and the landowners are still pending in said court and have not been disposed of in any manner. (T. R. 3)

Immediately upon the refusal of the awards by the landowners and the tender thereof into the court, as aforesaid, Georgia Power Company went into possesson of the rights-of-way involved and constructed its tranmission lines thereon and commenced transmitting electric current through said lines. (T. R. 2 & 3)

Thereafter, on January 2, 1950, over one year following the denial of the interlocuaory injunction by the court, and approximately a year subsequent to the award of the assessors, and approximately one year subsequent to the company's going into possession of the rights-of-way involved and erecting and energizing its transmission lines and erecting its improvements thereon, the Judge of the Superior Court of Wilkinson County, Georgia, called for trial,

before the court and jury, the equitable petition of plaintiffs, which sought an injunction against the company, and which was filed on November 13, 1948. (T. R. 3)

Prior to announcement of being ready for trial, Georgia Power Company presented to the court and filed its written plea of estoppel and motion to dismiss the landowners' equitable petition, on the following grounds, to-wit:

> "(1) The judgement of this Court in the above-captioned matter, dated December 17, 1948, being the judgement of court on the interlocutory hearing concerning the relief prayed in plaintiffs' petition, found, as a matter of law, that petitioners were not entitled to the injunctive relief sought on authority of Piedmont Mills vs. Georgia Railroad & Electric Co., 131 Ga. 129 (3) (b); and that said judgment was not appealed from, nor were any exceptions taken or preserved, and since said judgment denied the relief sought as a matter of law, said judgment became the law of the case, and plaintiffs' petition should be dismissed.
>
> "(2) That on or prior to January 7, 1949, the petitioners named and selected an assessor in the condemnation proceedings compalined of in their petition, and defendant's assessor with the plaintiffs' assessor selected a third assessor, and such assessors, after hearing, made an award on Jaunary 7, 1949. Plaintiffs participated in said hearing in person and by attorney, and averring dissatisfaction with said award of assessors in both of said condemnation proceedings, filed their appeals to the Superior Court. Defendant shows that the acts of the plaintiffs in selecting said assessor, participating in person and by attorney in said condemnation proceedings, and their appeal thereof to the Superior Court was such conduct as estops them from urging any further hearings on said equitable petition, and consequently the same should be dismissed.

"(3) Defendant was dissatisfied with the award of the assessors in both of said condemnation proceedings, and within the time prescribed by law filed its appeal to the Superior Court and tendered the full amount of both of said awards to the plaintiffs, which was refused, and said awards, in the form of cash, were deposited with the Clerk of the Superior Court of Wilkinson County; all as provided by law.

"(4) Defendant, several months heretofore, went into possession of all of the land condemned in said condemnation procedings for which said awards were made, and has erected valuable improvements thereon, in the form of towers for transmitting electrical energy and other equipment and structures for use in transmitting electric current, and said electric current is traveling through said equipment and over all of said land at the present, and has been for some time heretofore, for the purpose of serving the general public and as a public service to the State of Georgia. The condemnation proceedings and the erection of said towers and equipment sought to be enjoined by plaintiffs have already been completed, and, consequently, an injunction cannot be granted to prevent something which has already been completed, and thus said petition of plaintiffs should be dismissed." (T. R. 3 and 31)

In support of this plea and motion, Georgia Power Company offered in evidence for the court's consideration thereon the following which was admitted to be true and was allowed by the Court without objection:

(1) The original equitable petition, as amended, of landowners, filed November 13, 1948.

(2) The judgement of the court of December 17, 1948, denying the interlocutory writ of injunction.

(3) The condemnation notices and petitions of Georgia Power Company.

(4) The awards of the assessors in said condemnation proceedings.

(5) The appeals of the landowners from said awards.

(6) That the landowners had prosecuted their claim before the assessors in person and by attorney, submitting evidence for the consideration of the assessors in making their awards, and that the landowners had prosecuted appeals from said awards, and the same were then pending.

(7) The verified written plea of estoppel and motion to dismiss, above set out.

(8) The written appeal of the plaintiffs which they prosecuted to the Superior Court from the award of the assessors.

All of the above was admitted as correct and submitted to the trial judge for determination. (T. R. 3, 4 & 159)

The trial court overruled and denied the plea of estoppel and motion to dismiss, and the case went to trial and resulted in a verdict of the jury in favor of the landowners, and the court entered its judgment, granting the injunction and enjoining the company from further prosecution of the condemnation proceedings; said judgment was so entered on January 4, 1950. (T. R. 36 & 37)

There were other points made by the company which were preserved by proper exceptions. Motion for new trial and other motions were made and overruled by the trial court, and the whole matter was appealed by Georgia Power Company to the Supreme Court of the State of Georgia. (T. R. 157-162)

The only point passed on by the Supreme Court of the State of Georgia was whether or not the trial court erred in overruling

and denying the plea of estoppel and motion to dismiss of Georgia Power Company, hereinbefore set out in full. (T.R. 157-162)

On September 11, 1950, the Supreme Court of Georgia rendered its decision in the case, holding that the trial court erred when it did not sustain the plea of estoppel and motion to dismiss of Georgia Power Company, and that the same should have been sustained, and that all subsequent proceedings were nugatory. (T. R. 157-162)

Motion for rehearing was made by the landowners and the same was denied by the Supreme Court on October 13, 1950, and the landowners sued out this petition for writ of certiorari.

It is significant to note that in the landowners' original injunctive petition they alleged that the company, in seeking to condemn the lands involved, was acting in bad faith, and that no bona fide effort had been made, as required by statute, to acquire the lands by contract and purchase prior to the institution of the condemnation proceedings, and that both these allegations, of bad faith and failure to make a bona fide effort to acquire the lands involved by contract and purchase, were stricken and withdrawn by the landowners before the case was submitted to the jury. (T. R. 6)

II

PETITIONERS' BASIS OF CLAIM FOR JURISDCITION

The petition for certiorari is evidently based on so much of U. S. Code Annotated, Title 28, Sect. 1257 (3), as states:

> "*Final judgments or decrees rendered by the highest court of a state in which a decision could be had may be reviewed by the Supreme Court as follows*:
>
> "(3) *By writ of certiorari . . . . where any right, privilege or immunity is specially set up or claimed under the Constitutoin . . . of . . . the United States,*"

on the ground that the Supreme Court of Georgia did not pass upon

petitioners' claim that there was no "public necessity" for the lands condemned, and the failure to so pass upon the claim was a violation of the Fourteenth Amendment to the Constitution of the United States, as follows:

> *" . . . . nor shall any State deprive any person of life, liberty, property without due process of law; nor deny any person within its jurisdiction the equal protection of the laws."* (*Pet. for Cert. pp* 6, 7)

Petitioners concede that these alleged "Federal questions" were not presented and made in the trial court in Wilkinson County, Georgia, and were not presented and made in the Superior Court of Georgia until after the Supreme Court of Georgia had rendered its decision in the case, but that such alleged "Federal questions" were for the first time presented and made on motion for rehearing in the Supreme Court of Georgia after the rendition of the decision of that court in this case. (Pet. for Cert., p. 10)

Petitioners further contend that the decision of the Supreme Court of the State of Georgia was a "surprise decision," and that their motion for rehearing was the "first opportunity" they had to raise such questions, and that the decision of the Supreme Court of Georgia was "unexpected." (Pet. for Cert., p. 10)

Petitioners also contend that they could not have anticipated the "surprise decision" of the Supreme Court of Georgia because they were unable to find any judicial precedent for the decision of the Supreme Court of Georgia in this case.

III

BRIEF AND ARGUMENT

A

The contention that the equal protection of the laws clause of the Fourteenth Amendment to the Constitution of the United States is involved in this case is wholly without merit, and no authority is cited in petitioners' application or brief in support there-

of and no contention thereon is made by petitioners.

Before petitoners could possibly have any basis for this writ of certiorari, it would have to be first established that the due process clause of the Fourteenth Amendment to the Constitution of the United States guaranteed or otherwise entitled petitioners to a judicial hearing on and determination of the question of the "public necessity" of the lands condemned.

It has been repeatedly held by the Supreme Court of the United States, as well as the Supreme Court of Georgia, that the due process clause does not guarantee nor entitle a landowner to a judicial hearing on or determination of the "public necessity" of lands sought to be condemned.

> "Fourth. Finally, the validity of the act is challenged *as denying due process of law*, on the ground that the question of the necessity for taking the property has not been determined by the legislature itself, but is relegated to the city to decide ex parte, without appeal or opportunity for hearing and decision by an impartial tribunal. That the necessity and expediency of taking property for public use is a legislative, and not a judicial, question, is not open to discussion. *Adirondack R. Co. v. New York*, 176 *U. S.*, at p. 349; *Shoemaker vs. United States*, 147 *U. S.* 282, 37 *L. Ed.* 170, 184, 13 *Sup. Ct. Rep.* 361; *United States v. Gettysburg Electric R. Co.*, 160 *U. S.* 668, 685, 40 *L. Ed.* 576, 582, 16 *Sup. Ct. Rep.* 427; *Mississippi & R. River Boom Co. v. Patterson*, 98, *U. S.* 403,406, 25 *L. Ed.* 207. Neither is it any longer open to question in this court that the legislature may confer upon a municipality the authority to determine such necessity for itself *Bragg v. Weaver*, 251 U. S. *at p* 58, 64 *L. Ed.* 136, 40 *Sup. Ct. Rep.* 62; *Sears v. Akron*, 246 *U. S.* 242, 251, 62 *L. Ed.* 688, 698, 38 *Sup. Ct. Rep.* 245.

"The question is purely political, does not require a hearing, and is not the subject of judicial inquiry." (Emphasis ours.)

> *Joslin Mfg. Co. v. Providence*, 67 *L. Ed.* 1167, 262 *U. S.* 667, 678, 679.

This rule as announced in the Joslin Manufacturing Company case above by the Supreme Court of the United States is also the rule announced in the following cases:

Boom Co. vs. Patterson, 98 *U. S.* 403, 404-406, 25 *L. Ed.* 206-207.

Shoemaker vs. U. S. 147 *U. S.* 282, 37 *L. Ed.* 170.

Also, the Joslin Manufacturing Company case was followed by the United States Supreme Court in the case of *Rindge vs. Los Angeles County,* 262 *U. S.* 700, 709, 67 *L. Ed.* 1186,1193.

It is stated in 18 Am. Jur. as follows:

"Where the intended use is public, the necessity and expediency of the taking may be determined by such agency, and in such mode as the state may designate. They are legislative questions, no matter who may be charged with their decision, and *a hearing thereon is not essential to due process in the sense of the Fourteenth Amendment.*" (*Emphasis ours.*)

18 *Am. Jur., Sect* 106, *p.* 733.

"The comparative desirability and necessity for the site (condemned) were matters for legislative or administrative determination rather than for a judicial finding."
U. S. vs. Carmack, 329 *U. S.* 230, 247, 91 *L. Ed.* 209, 220.

(Citing Joslin Manufacturing Co., supra, and many other U. S. Supreme Court cases for authority.)

This rule as announced by the United States Supreme Court, to the effect that the Fourteenth Amndment of the Federal Constitution does not require a hearing on the necessity or expediency of the taking of private property for public purposes, has been clearly recognized, established and announced in the State of Georgia by the Supreme Court of that State.

"The necessity for taking private property for public use is a question for legislative determination and the provisions of the Code relating to such taking are not, because they fail to provide for a special tribunal to pass upson such necessity, violative of the constitutonal inhibition against taking the property of the citizen without due process of law."

Savannah, Florida & Western Ry. Co. vs. Postal Telegraph-Cable Co., 115 *Ga.* 554 (2)

Following some of the aforementioned decisions of the Supreme Court of the United States, the Supreme Court of the State of Georgia has stated:

"It is now fairly well settled that 'the necessity or expediency of taking property for public use are legislative questions upon which the owner is not entitled to a hearing under the due process clause of the Fourteenth Amendment." *Boom Co. vs. Patterson,* 98 *U. S.* 403; *Bragg vs. Weaver,* 251, *U. S.* 57, *Joslin Mfg. Co. vs. Providence,* 262 *U. S.* 668; *Georgia vs. Chattanooga,* 264 *U. S.* 472; *North Laramie Land Co. vs. Hoffman,* 268 *U. S.* 276."

Tift vs. Atlantic Coast Line RR. Co. et. al., 161 *Ga.* 432 (4), 446.

Therefore, if petitioners are not guaranteed nor entitled to a judicial hearing on and determination of the question of the necessity or expediency of taking private property for public purposes, certainly there is no merit in their contention that the decision of the Supreme Court of the State of Georgia in this case violated the Fourteenth Amendment.

B

Also, it appears that the petition for the writ of certiorari is without merit, even were it meritorious otherwise, because the alleged claim of right under the Fourteenth Amendment to the United States Constitution was presented and came too late.

The rule appears to be that if a constitutional questoin is presented too late for consideration by the State court of last resort under the State rules of practice and procedure, and therefore could not be considered by the State court of last resort under such State's rules of practice and procedure, then the question is presented too late to give the Supreme Court of the United States jurisdiction, unless, probably, it is made to appear that the decision of the State court of last resort is rendered in a spirit of evading and defeating the claim of the Federal right, or where the constitutional question "first arose from the unanticipated act of the State court in giving to a *statute* a new construction which threatens rights under the constitution," so that the question when presented was "the first opportunity for raising it." (Emphasis ours.)

It cannot possibly be contended that the decision of the Supreme Court of the State of Georgia in this case was rendered "in a spirit of evading and defeating" the alleged claim of the Federal right under the Fourteenth Amendment to the United States Constitution.

Therefore, we come to consideration of the practice and procedure in the State of Georgia and whether or not the decision of the Supreme Court of Georgia in this case was an "unanticipated" new construction of a State statute and that the first opportunity to present the constitutional question by petitioners arose on their motion for rehearing in the Supreme Court of the State of Georgia after that court rendered its decision in this case.

The long established and much announced rule of practice and procedure in the State of Georgia is that no constitutional question, State or Federal, can be first raised in an appellate court. It is so held in *Board of Education of Houston County et al. vs. Board of Trustees of Fort Valley Consolidated School District,* 170 *Ga.* 509 (2), wherein it is stated:

> "When a constitutional question is neither raised nor passed upon in the lower court, but is raised for the first time

in this court, it will not be considered."

This rule is announced in a multitude of reported cases from the Supreme Court of Georgia, some of which are:

Loftin vs. Southern Sec. Co. 162 *Ga.* 730
Jackson vs. Johnson, 164 *Ga.* 839
Houston vs. Thomas, 168 *Ga.* 67

In the following case a landowner was attempting to enjoin an electric power company from exercising the power of eminent domain, such as the case at bar, and for the first time presented in the Supreme Court of Georgia a constitutional question. The Supreme Court of Georgia held that, since no constitutional question was presented theretofore, the same could not be considered by the Supreme Court.

Rogers vs. Toccoa Electric Power Co., 163 *Ga.* 919 (5)

This proposition was announced in a case that came to the United States Supreme Court from the Supreme Court of the State of Georgia, with citation of volumnious authority, as follows:

> " . . . . But, in addition to the insufficiency of the specification, the adverse action of the trial court was not preserved by exceptions pendente lite or assigned as error in due time in the bill of exceptions, as the settled rules of the State practice required. In that situation, the State Supreme Court declined to review any of the rulings of the trial court in respect of that and other preliminary issues; and this determination of the State court is conclusive here . . . .
>
> "The Federal question was never properly presented to the State Supreme Court unless upon motion for rehearing; and that court then refused to consider it. The long established general rule is that the attempt to raise a Federal question after judgment upon petition for rehearing comes

too late, unless the court actually entertains the question and decides it . . . .

"Petitioner, however, contends that the present case falls within an exception to the rule—namely, that the question respecting the validity of the *statute* as applied by the lower court first arose from its unanticipated act in giving to the statute a *new construction* which threatened rights under the Constitution. There is no doubt that the Federal claim was timely if the ruling of the State court could not have been anticipated and a petition for rehearing presented the first opportunity for raising it. . . .

" . . . . It follows that his (petitioner's) contention that he raised the Federal question at the first opportunity is without substance and the appeal must be denied for want of jurisdiction." (Emphasis ours)

Herndon vs. Georgia, 295 *U. S.* 441, 79 *L. Ed.* 1530.

First we would like to point out that the decision of the Supreme Court of Georgia in the case at bar did not ***construe any statute*** whatsoever, but was the application of ancient and established rules of law in the State of Georgia respecting the "election of remedies," "estoppel," "laches" and "abandonment."

"If, with actual knowledge or notice of the substantial facts, he chooses the position he will occupy, and which will authorize him *to appeal to the courts* for one of the remedies, ***and does in fact proceed in court to enforce such remedy,*** it would seem to be little short of trifling with judicial procedure to allow him at his mere option to change his mind, dismiss his suit, repudiate the position which he has thus solemnly taken, assume another directly inconsistent with it, and ask the courts to enforce a remedy based on his new election. If he may change his mind once after having assumed and thus declared his position and based his suit upon it, why may he not do so again? And where is the limitation upon decisions and re-decisions, selection and

re-selection, and vacillation between inconsistent positions and remedies, as it may appear to the litigant from time to time that his chances are better in one direction or the other? Can he be allowed to swim hither and thither in a sea of legal uncertainty until he has been transfixed by the harpoon of a final judgment? (Emphasis ours)

Board of Education vs. Day, 128 *Ga.* 156.

This rule is also announced in the following Georgia cases:

McClellan vs. McClellan, 135 *Ga.* 95.
Warner vs. Hill 153 *Ga.* 510.
Chapple vs. Hight, 161 *Ga.* 629.
Beard vs Beard, 197 *Ga.* 487.
Equitable Life Assurance Society vs. May, 82 *Ga.* 646.
Hand vs. Brown, 144 *Ga.* 272.
Hawthorne vs. Pope, 51 *Ga. App.* 498.
Ellis vs. Ellis, 161 *Ga.* 360.

This rule is further announced in the following:

18 *Am. Jur., Sect* 12, *p.* 135.
18 *Am. Jur., Sect.* 53, *p.* 168.
Intertype Corp. vs. Pulver (*Fla.*) 135 *Sou.* 793.
Brockhaus vs. Rose (*Oklahoma*) 221 *Pac.* 28.
H. G. Vogel Co. vs. Original Cabinet Corp. (*Mich.*) 233 *N. W.* 200.
20 *C. J., Sect* 19, *p.* 28.
20 *C. J., Sect.* 20, *p.* 29.
20 *C. J., Sect.* 21, *p.* 32.
20 *C. J., Sect.* 33, *p.* 38.
Davis vs. Wakelee, 156 *U. S.* 680.

The rule of law in Georgia, and elsewhere, clearly appears to be that petitioners, by participating in the assessors' hearing, submitting evidence of value of their lands at the hearing, and prosecuting an appeal therefrom to the court and jury of Wilkinson County,

Georgia, necessarily recognized and admitted the validity of the condemnation proceeding, and therefore abandoned their equitable proceeding and were estopped to subsequently insist thereon as the Supreme Court of Georgia held in this case.

Central of Ga. Ry. Co. vs. Bibb Brick Co., 149 *Ga.* 38.
Atlantic & Birmingham Ry. Co. vs. Penney, 119 *Ga.* 479.
Georgia Granite RR. Co. vs. Venable, 129 *Ga.* 341.
Neal Banking Co. vs. Chastain, 121 *Ga.* 500.
Vaughn vs. Strickland, 108 *Ga.* 660.
Winslow vs. B. & O. Ry. Co., 208 *U. S.* 59, 52 *L. Ed.* 388.
30 *C. J., Sect.* 311, *p.* 884, *citing*:
Trickey vs. Schlader, 52 *Ill.* 78 and
Preston vs. Newton, 213 *Mass.* 483, 100 *N. E.* 641.

> "The prosecution of his claim for compensation will estop the owner from maintaining ejectment. He cannot claim damages for the taking of his land and at the same time deny that his land is taken."

Lewis Eminent Domain, 3rd *Ed., Vol* 2, *Sect.* 929, *p.* 633.

Also:

Lewis Eminent Domain, 3rd *Ed., Vol.* 2, *Sect.* 611, *p.* 1075.
1 *C. J., Sect* 443, *p.* 1169.
Wells vs. Goss, 110 *La.* 347, 34 *Sou.* 470.
Kern vs. Rogers (*Iowa*), 118 *N. W.* 515.
Seely vs. Mitchell, 85 *Ky.* 408, 4 *S. W.* 190.
10 *R. C. L., Sect* 179, *p.* 210.
28 *C. J. S., Sect* 16, *p.* 1091.

It is reasonable to assume that all the above and foregoing law and authority was cited the trial court by respondent herein and also cited to the Supreme Court of the State of Georgia when respondent appealed the case to that court, and that petitioners had a copy thereof.

In view of all of the above and foregoing old and established rules of law, the contentions of petitioners that the decison of the Supreme Court of the State of Georgia in the case at bar based thereon was "unexpected," not susceptible of being "anticipated," or a "surprise," are without merit.

The decision of the Supreme Court of Georgia in this case is merely a reiteration and further announcement of the established rules of law with respect to election of remedies, abandonment, laches and estoppel.

It might be attempted to demonstrate a distinction between the Georgia cases, to-wit: *Central of Georgia Railway Co. vs. Bibb Brick Co.,* 149 *Ga.* 38, *Atlantic & Birmingham Ry. Co. vs. Penney,* 119 *Ga.* 479, etc., and the case at bar on the ground that in the named cases the landowners accepted the award of the assessors in the condemnation proceedings, whereas, in the case at bar, the landowners did not accept the awards but refused them, and the respondent tendered the same into the registry of the court, and the landowners prosecuted an appeal from said awards. As pointed out by the Supreme Court of Georgia in the case at bar, the deposit of the funds in the registry of the court by respondent herein is "the legal equivalent of payment to plaintiff.," citing:

Oliver vs. Union Point & White Plains Ry. Co., 83 *Ga.* 257.

Pilgreen vs. City of Atlanta, 204 *Ga.* 710.

C.

Moreover, it is the established rule in Georgia that the Supreme Court of Georgia will refrain from passing upon any constitutional question, *even though it is properly presented for determination,* "if there is any other valid ground upon which to base a decision."

Smith vs. Georgia Granite Corp., 186 *Ga.* 634, 639.

McGill vs. Osborne, 131 *Ga.* 541 (2)

Georgia Power Co. vs. Decatur, 173 *Ga.* 219 (3)

It is the established rule in the Supreme Court of the United

States that such court has no jurisdiction to determine questions affecting procedure, practice or remedies of the State court, but that the rulings of the State court thereon are conclusive.

Central Vermont Ry. Co. vs. White, Admrx., 238 *U. S.* 507, 513.
Market Street Ry Co. vs. Railroad Commission of California, 324 *U. S.* 548, 89 *L. Ed.* 1171.

One of the justices of the State Supreme Court, in his special concurrence with the majority of the court, based his special concurrence on the ground of laches, and the Supreme Court of the United States has held that this is purely a State question.

> "Where the judgment of the State court rests upon non-Federal questions, sufficient to support it, such as laches and long delay, this court cannot review the judgment upon the ground that a Federal question also exists."
> *Preston vs. City of Chicago*, 226 *U. S.* 447.
> *Moran vs. Horsky*, 171 *U. S.* 205.

Also, the Supreme Court of the United States clearly recognizes that there is no Federal general common law, and that the law of a State, as announced by its legislature or the highest court in the State, is a law of the particular State, and is of no Federal concern.

> "Whether the law of the State shall be declared by its legislature in a statute, or *by its highest court in a decision* is not a matter of Federal concern. There is no Federal general common law. Congress has no power to declare substantive rules of common law applicable in a State, whether they be local in their nature or general, be they commercial law or part of the law of torts, and no clause in the Constitution purports to confer such a power upon the Federal courts." (Emphasis ours.)
> *Erie R. R. Co. vs. Tompkins*, 304 *U. S.* 64, 82 *L. Ed.* 1188.

Thus it conclusively appears that the Supreme Court of the United States does not have jurisdiction of this case and the writ of certiorari should be denied, because:

(1) The due process clause of the Fourteenth Amendment to the United States Constitution, relied upon for jurisdiction, does not grant nor require that a judicial hearing or determination be had on the public necessity of private property condemned for public purposes.

(2) Even if the Fourteenth Amendment to the United State Constitution does grant or require such a judicial hearing or determination, the same was raised too late, and the case is not one within the exception that the decision was a surprise, unexpected or unanticipated one, because the rule upon which the decision of the Supreme Court of Georgia is based, that is, estoppel, laches, abandonment and election of remedies, is "as old as the hills" in Georgia jurisprudence, and petitioners were apprized of the same as early as the trial of the case in Wilkinson County, Georgia, when the point was first made and insisted upon by respondent at the call of the case in such trial court.

(3) The Supreme Court of the United States has no jurisdiction of a State court case, such as the one at bar, wherein jurisdiction of the court is alleged to arise out of a constitutional question which, because of the State practice and procedure was not, and could not have been, passed upon by the State court of last resort.